Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

THOMAS A. BARFIELD,

Petitioner,

v.

ORMET PRIMARY ALUMINUM CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the Age Discrimination in Employment Act, is direct evidence of discriminatory intent required to avoid judgment as a matter of law for the employer?

2. Is the Fifth Circuit correct that the plaintiff does not receive the benefit of favorable inferences, on motion for summary judgment, from an ageist statement by the decision maker? Is the Fifth Circuit's summary judgment standard proper – that a decision maker's age-based comment must be disregarded and afforded no probative weight unless the statement is "direct and unambiguous, allowing a reasonable jury to conclude without any inferences or presumptions that age was an impermissible factor in the decision to terminate the employee"?

3. Is it proper to ignore expert statistical evidence, affording it no value on motion for summary judgment, on the grounds that such evidence is by its nature generalized and thus incapable of rebutting the particularized reason for discharge given by the employer?

LIST OF PARTIES

Petitioner: Thomas A. Barfield

Respondent: Ormet Primary Aluminum Corporation

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Thomas A. Barfield, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was issued per curiam and was unreported as No. 98-30934 of the summary calendar of that Court. Petition for Rehearing En Banc was denied. The appeal arose from the ruling of the United States District Court for the Middle District of Louisiana in Civil Action No. 97-246-A issued July 28, 1998. A ruling on motion for new trial or alternatively to amend judgment was issued in that same matter by the district court on August 19, 1998.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on June 30, 1999. Petition for rehearing en banc was denied August 16, 1999, by a writ of certiorari under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statute construed is the Age Discrimination in Employment Act, 29 U.S.C. §623(a) which states: "It shall

be unlawful for an employer . . . (1) . . . to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age. . . ".

STATEMENT OF THE CASE

This is an age discrimination suit, brought in federal court pursuant to 28 U.S.C. §1331 jurisdiction, that was dismissed on summary judgment on the basis that plaintiff did not present sufficient additional proof beyond the *prima facie* case and proof that the reasons given by the employer were false. Petitioner Barfield, a mechanical engineer, had maintained an immaculate 34 year employment record at Ormet Aluminum until he was fired in April, 1996, at age 61 for alleged insubordination. Barfield was replaced by a man 18 years his junior whom Ormet conceded was less qualified. (P-2).

Ormet initially responded to the EEOC that Barfield was fired "strictly" over his refusal to follow a direct order from plant general manager, Quentin Bell, to implement a new shift schedule for the instrument repairmen whom Barfield supervised. (P-7, attachment 1). When this allegation was disproved by the depositions of several current Ormet employees, Ormet changed its purported reason to contend on motion for summary judgment that Barfield had been fired for refusing to answer Bell's questions at a meeting about whether the repairmen were planning to protest the new schedule. Barfield and the only current Ormet employee who was present at the meeting both deposed that Barfield did not refuse to answer Bell's questions and was not insubordinate. (P-5,

pp. 21-26; P-1). Petitioner's supervisor, still employed at Ormet, deposed that Barfield was "conscientious" and "dedicated" and that he could not say anything bad about Barfield. (P-6, pp.19-20).

The Court of Appeals concluded that even if petitioner had established that he had not refused to answer the questions, he still had not raised a material issue that the real reason for his termination was age discrimination. In a per curiam opinion, the Fifth Circuit stated that "essentially for the reasons given by the Trial Court", plaintiff's expert statistical proof and evidence of age-based remarks made by Bell about Barfield could be disregarded.

Plaintiff submitted evidence that Mr. Bell, who came to the plant in September, 1993, told managerial employee Porter Buratt, at a Christmas Eve party in 1994, that he had been sent to Louisiana to carry out a plan to cut costs, raise profits and improve the work force. Bell stated that he preferred younger workers to achieve these goals because they had more innovative ideas and could be paid less. (P-9). Bell then specifically mentioned Barfield, saying that he could be replaced at the same pay by three younger men who would have "newer ideas in more modern times." (P-8, p. 12).

The Trial Court, perpetuating a series of Fifth Circuit cases which hold that the plaintiff is not granted the benefit of favorable inferences on summary judgment as to age-based comments made by the decision maker, found that these statements were "stray remarks" that did not demonstrate age bias.

Plaintiff produced the affidavit testimony of a university professor of sociology and statistics who concluded that the pattern of hiring, promotion and firing during Mr. Bell's three and one-half year tenure at the Louisiana plant reflected a statistically significant bias against older workers. (P-10, P-11). The Trial Court summarily discarded the statistical evidence on the basis that it was "generalized" and thus could not rebut the "particularized" reason given by the employer. The Court further stated, without explanation or evidentiary hearing, that the evidence would not have been presented to the jury because it was not based on acceptable scientific analysis.

REASONS FOR GRANTING THE WRIT

Petitioner raises the same issue of the standard for sufficiency of evidence that is presented in the *Reeves v. Sanderson Plumbing* (No. 99-536) case for which certiorari recently has been granted. Petitioner urges that his case be accepted as a companion to the *Reeves* case or, alternatively, that it be held pending resolution of that matter. This case also raises the related issue of how certain types of evidence are being improperly disregarded by the Fifth Circuit in deciding discrimination cases on summary judgment, making the "pretext-plus" standard a nearly insurmountable barrier.

Certiorari should be granted because there is a conflict among the circuits as to the nature of proof needed to survive summary judgment and to sustain a verdict in an employment discrimination case. In addition to requiring

proof beyond showing a *prima facie* case and the pretextual nature of the employer's reasons, the Fifth Circuit has adopted an incorrect standard for judging the probative value of ageist statements and has shown a hostility towards statistical evidence that is at variance with established Supreme Court jurisprudence. The effective burden of proof required of an age discrimination plaintiff in the Fifth Circuit is inconsistent with the relevant decisions of this Court.

The raging issue in employment discrimination law, present in this case, is the effect of this Court's ruling in *St. Mary's v. Hicks* on employer-brought summary judgment motions. Language in *Hicks* strongly suggests that proof establishing a *prima facie* case and a triable issue as to the falsity of the employer's reasons will always allow plaintiff to escape summary judgment; i.e., such evidence will "permit" the trier to infer discrimination and "no additional proof" is required. *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2749 (1993). Defendants rely on other sections of the opinion to argue that plaintiff must always prove falsity *and* that the real motive was discrimination ("pretext-plus"). The fallout from *Hicks* has been confusion among the circuits and even conflicting intra-circuit standards.

According to a leading treatise, seven of the circuits have held that evidence of pretext combined with a *prima facie* case will always be sufficient to defeat a motion for summary judgment. "Employment Discrimination Law", *Lindemann and Grossman*, Third Edition, 1998 Supplement, pp. 10-11, citing *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F. 3d 1061 (3d Cir. 1996); *Mitchell v. Data Gen. Corp.*, 12 F. 3d 1310 (4th Cir. 1993); *EEOC v. Yenkin-Majestic Paint*

Corp., 112 F. 3d 831 (6th Cir. 1997); *Wohl v. Spectrum Mfg., Inc.*, 94 F. 3d 353 (7th Cir. 1996); *Warren v. City of Carlsbad*, 58 F. 3d 439 (9th Cir. 1995); *Randele v. City of Aurora*, 69 F. 3d 441 (10th Cir. 1995); *Kolstad v. American Dental Ass'n*, 108 F. 3d 1431 (D.C. Cir. 1997). The Eighth and Eleventh Circuits have developed intra circuit conflicts over the correct interpretation of *Hicks*. *Id.* at 12. The First, Second and Fifth Circuits have held that pretext alone will not necessarily support a finding of discrimination. *Id.* at 11-12, citing *Fisher v. Vassar College*, 70 F. 3d 1420 (1997); *Barbour v. Dynamic Resource Corp.*, 63 F. 3d 32 (1st Cir. 1995); *Rhodes v. Guiberson Oil Tools*, 75 F. 3d 989 (5th Cir. 1996). In recent rulings, the Fifth Circuit has overtly adopted the pretext-plus rule. See, e.g., *Reeves, supra*; *Walton v. Bisco Industries, Inc.*, 119 F. 3d 368 (5th Cir. 1997). The Fifth Circuit has even questioned whether after *Hicks* a showing that the plaintiff was clearly better qualified than a member of the non-protected class who was favored over him creates a jury issue since "all" that this establishes is pretext. *Bodenheimer v. PPG Industries Inc.*, 5 F. 3d 955, 959, n. 8. *Scott v. Univ. of Miss.*, 148 F. 3d 493, n. 15 (5th Cir. 1998).

Here the plaintiff showed that Ormet abandoned the original reason it gave for plaintiff's termination and that the alternative reason Ormet finally proposed on summary judgment also was not true. It is undisputed that petitioner proved a *prima facie* case and thus, having established a triable issue on pretext, would have been permitted to proceed to trial in a majority of the circuits without producing any further proof.

The present case also illustrates, as does *Reeves*, how daunting a task the plaintiff faces to establish the elusive

"other evidence" of age discrimination mandated by the pretext-plus standard. The Trial Court in this case, (to whom the Court of Appeals deferred by affirming per curiam), afforded no weight, on motion for summary judgment, to the comments made by the decision maker that were specifically addressed to the plaintiff and which reflected a stereotyped conception that older workers could not be innovative or have modern ideas. Although the comments were made 16 months before petitioner was fired and are not direct evidence of discrimination, nothing suggests that Bell had changed his views. The statistical evidence and the events in April, 1996, fit with Bell's statements that he had a plan to weed out older workers.

The Trial Court relied on Fifth Circuit jurisprudence which holds that "in order for an age-based comment to be probative of an employer's discriminatory intent, it must be direct and unambiguous, allowing a reasonable jury to conclude without any inferences or presumptions that age was an impermissible factor in the decision to terminate the employee." The Court cited similar language in summary judgment verdicts in *EEOC v. Texas Instruments, Inc.*, 100 F. 3d 1173 (5th Cir. 1996) (Employee told that "his age got him", that company "had to make room for some of the younger supervisors" and that "it's just that you reached the age and years of service that we can bridge you to retirement."); and *Bodenheimer, supra,* (supervisor's comment that he hopes when he gets to plaintiff's age that somebody does the same thing for him, that is, provide a good retirement).

The Fifth Circuit's standard of denying plaintiff the benefit of favorable inferences from age-based comments

violates the fundamental rule of summary judgment that all factual inferences must be resolved in favor of the non-moving party. See, e.g., *Hunt v. Cromartie*, 119 S. Ct. 1545 (1999). This erroneous standard is the result of the Fifth Circuit's misapplication of a discussion of the difference between "direct" and circumstantial evidence from *Castle v. Sangamo Weston*, 837 F. 2d 1550 (11th Cir. 1989), which was quoted in *Carter v. City of Miami*, 870 F. 2d 578 (5th Cir. 1989) which in turn was cited by *Bodenheimer, supra*, in turn by *Texas Instruments, supra*, and ultimately by the Trial Court here. The definition of direct evidence, i.e., that which directly and conclusively reveals the discriminatory animus of the actor, is now being used by the Fifth Circuit as the litmus for whether an age-based comment has any probative value on summary judgment.

Buoyed by this incorrect standard, the Fifth Circuit has routinely dismissed discriminatory statements as "stray remarks." See, e.g., *Boyd v. State Farm Ins. Co.*, 158 F. 2d 326 (5th Cir. 1998) (supervisor's calling black employee "Buckwheat" and "Porch Monkey" are stray remarks from which no reasonable fact-finder could infer discrimination); *Price v. Marathon Cheese Corp.*, 119 F. 3d 330 (5th Cir. 1997) (supervisor's comment that he wanted to get rid of older employees and hire "young blood"); *Waggoner v. City of Garland*, 987 F. 2d 1160, 1166 (5th Cir. 1993) (calling an employee "an old fart" or saying that "a younger person could do faster work" insufficient to establish discrimination); *Brown v. CSC Logic, Inc.*, 82 F. 3d 651 (5th Cir. 1996) (remarks that the staff was "getting long in the tooth"); *Guthrie v. Tifco*, 941 F. 2d 374 (5th Cir. 1991) (comments by retired founder to his son that he

should "surround himself with people his age" and questioning plaintiff "how much longer he wanted to work" insufficient proof); *Atkin v. Lincoln Property Co.*, 991 F. 2d 268 (5th Cir. 1993) (employer's comment that plaintiff was "getting up there in years" and that it would be a good idea for him to retire).

Statistical evidence has been considered relevant from the inception of employment discrimination law. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This Court has noted that while not irrefutable, statistical analysis will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 (1977). The Trial Court here expressed an indiscriminate, inappropriate hostility towards the use of statistics which was sanctioned by the per curiam opinion in accordance with other Fifth Circuit jurisprudence. See, e.g., *EEOC v. Texas Instruments, supra; Scott, supra.* In a single paragraph, the Trial Court summarily rejected plaintiff's evidence both on the basis that it was "generalized" and thus incapable of rebutting the specific reason given by Ormet for the firing and further, without discussion or a hearing, on the ground that the underlying methodology was not reliable evidence. The Trial Court offered no explanation for its conclusion that Dr. Grandjean's testimony was based on unacceptable scientific analysis other than citing the title of a layman's publication entitled "How to Lie With Statistics."

If a plaintiff is not allowed to introduce statistical proof and if age-based comments are only relevant if they conclusively establish direct evidence of the employer's discriminatory animus, what then can a plaintiff do to

provide the "other evidence" of discrimination necessitated by the pretext-plus standard? Is direct evidence required? The effective burden of proof imposed upon a plaintiff in the Fifth Circuit is inconsistent with the framework fashioned in *McDonnell Douglas* and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Those cases recognized the inherent difficulty of proving an employer's discriminatory intent and allowed for inferential proof. The Fifth Circuit's practice, as reflected in this case, is also inconsistent with this Court's recent ruling in *Hunt v. Cromartie, supra*, wherein, this Court noted that motivation is a factual question generally not suitable for disposition on summary judgment. The same is true for employment discrimination cases.

CONCLUSION

Certiorari should be granted in this case to clarify the standard of proof for summary judgment in employment discrimination suits.

Respectfully submitted:

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UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 98-30934
Summary Calendar

THOMAS A. BARFIELD

Plaintiff-Appellant

VERSUS

ORMET PRIMARY ALUMINUM CORPORATION

Defendant-Appellee

Appeal from the United States District Court
for the Middle District of Louisiana

(97-CV-246)

(Filed Jun. 30, 1999)

Before DAVIS, DUHÉ and PARKER, Circuit Judges.

PER CURIAM:[1]

Thomas A. Barfield sues his former employer asserting claims of age discrimination and entitlement to severance benefits based on ERISA. The trial court granted summary judgment on both claims for the employer. On appeal, Barfield contends primarily that the non-discriminatory reason for termination offered by the employer is

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[1] Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

a pretext for age discrimination. He then argues that if he is successful on that issue he meets the qualifications of the ERISA plan for severance benefits.

We note that even if, as Appellant contends, his remarks at the meeting concerning the scheduling were misinterpreted by Bell, and that he did not refuse to answer the questions put to him, he has still not raised a material issue that the real reason for his termination was age discrimination. The statistical evidence he submitted was properly disregarded by the trial court, and the earlier remarks attributed to Bell were far to distant in time and remote in circumstances to create the material fact issue needed.

Since Appellant has not created a material fact issue that he was discharged "in the interest of Company convenience", he is not qualified for severance pay under the ERISA plan.

Accordingly, essentially for the reasons given by the trial court, its judgment is AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

THOMAS A. BARFIELD — CIVIL ACTION

VERSUS — NO. 97-246-A

ORMET PRIMARY
ALUMINUM CORPORATION

JUDGMENT

For the written reasons assigned and filed herein:

IT IS ORDERED ADJUDGED AND DECREED that the motion for summary judgment filed on behalf of defendant is hereby granted, and this action is hereby DISMISSED.

Baton Rouge, Louisiana, July 30, 1998.

/s/ John V. Parker
JOHN V. PARKER, CHIEF
JUDGE
MIDDLE DISTRICT OF
LOUISIANA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

THOMAS A. BARFIELD

CIVIL ACTION

VERSUS

NO. 97-246-A

ORMET PRIMARY
ALUMINUM CORPORATION

**RULING ON MOTION
FOR SUMMARY JUDGMENT**

(Filed Jul. 28, 1998)

This matter is before the court on a motion by defendant, Ormet Primary Aluminum Corporation ("Ormet") for summary judgment (Doc. 24). Plaintiff, Thomas A. Barfield, opposes the motion. Federal question jurisdiction is based on the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., and supplemental jurisdiction, 28 U.S.C. § 1367 There is no need for oral argument.

Undisputed Facts

Ormet operates two facilities – the alumina plant and the Burnside Bulk Marine Terminal – on contiguous land in Burnside, Louisiana. At the time of the events of this lawsuit, the general manager over the Burnside operations was Quentin Bell, who became general manager on September 7, 1993. Plaintiff is a sixty-three year old employee of Ormet who had been employed for thirty-

four (34) years. He was hired by defendant as a mechanical engineer on August 2, 1962. He later became the general supervisor of the instrument, electrical and general maintenance sections of the facilities. Guy Amone, maintenance manager, was plaintiff's immediate supervisor. Five supervisors, to whom union-represented hourly workers directly reported, worked directly under plaintiff. Among those supervisors was Charlie Seguin, instrument supervisor, who was in charge of eight instrument repairmen. The alumina plant operates twenty-four (24) hours per day, but instrument repairmen were often called out from home because instrument repairmen worked "straight days."

In April 1996, Bell instructed Amone to implement shift coverage for the Instrument repairmen. The instrument repairmen indicated to plaintiff a preference for a different schedule. Plaintiff agreed to further investigate the matter. On April 24, 1996, a meeting was held between plaintiff, Bell, Seguin, and Mike Lorio, an industrial engineer who assisted in scheduling. On April 25, 1996, the new schedule, which placed repairmen in the plant seven (7) days per week from 7:00 a.m. until 11:00 p.m., was posted. Thereafter, several instrument repairmen indicated to plaintiff their intention to resign from employment with defendant.

On April 26, 1996, four instrument repairmen did not report for work. Seguin and plaintiff indicated to Bell that this probably was a protest. Bell called a meeting with plaintiff, Seguin, and the plant labor relations manager,

Byron Boyd. During this meeting, Bell became angry with plaintiff, and dismissed plaintiff from the meeting.[1]

On April 30, 1996, Bell completed a memorandum recommending that plaintiff be discharged, and, in accordance with company procedures, discussed the decision with Tammy Caldwell, a personnel official. On May 6, 1996, Bell met with plaintiff. Bell discharged plaintiff for the stated cause of insubordination and provided plaintiff with a formal notice of discharge. Plaintiff was sixty-one (61) years of age. David Zalfen, who was forty-three (43) years of age, was promoted on July 15, 1996, to replace plaintiff.

Ormet offers severance benefits to eligible employees under a plan known as the Ormet Primary Aluminum Corporation Severance Allowance for Eligible Salaried Employees, which became effective May 1, 1996. The severance plan provides financial assistance to individuals whose employment is "Terminated in the Interest of Company Convenience, which is defined as being terminated by the Corporation in a work force reduction or job elimination where other suitable assignments are not available and rehire is considered unlikely, or where, in the judgment of the Corporation, a person is unable to effectively and efficiently perform a job." Plaintiff does not dispute that he was not terminated because of a work force reduction or job elimination.

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[1] While plaintiff and defendant each place different "spins" on that meeting, it is undisputed that Bell did become angry and that he did expel plaintiff from the meeting.

After being terminated, plaintiff filed a request for severance pay. Debra Boger, administrator of the severance plan, denied plaintiff's request. Plaintiff requested information in correspondence dated June 27, 1996 from Thomas H. Kiggans, counsel for plaintiff, to Bell. Bell forwarded the request to William R. D'Armond, counsel for defendant. D'Armond took no action on the request until April 22, 1997, when he received the complaint in this matter. Due to this oversight. D'Armond and Boger agreed that the administrative appeal period would be reopened for sixty (60) days. On June 17, 1997, Boger denied the appeal on the merits.

Plaintiff filed suit against Ormet on March 31, 1997. Plaintiff alleges that he was discharged based on his age in violation of both federal and state statutes prohibiting age discrimination in employment. Plaintiff also alleges that he is entitled to severance pay under the company severance pay plan. Plaintiff also claims that he is entitled to one hundred and no/100 ($100.00) dollars per day penalty under ERISA, 29 U.S.C. § 1132(c), because the administrator of the severance pay plan failed to furnish the requested information within thirty (30) days. Finally, plaintiff claims that he was discharged for the purpose of interfering with the attainment of rights under the severance pay plan in violation of Section 510 of ERISA, 29 U.S.C. § 1140.

Arguments

The Age Discrimination Claim

Defendant maintains that Bell discharged plaintiff because Bell believed that plaintiff did not support the

decision to change the schedule for the instrument repairmen, and that plaintiff refused to answer questions by Bell concerning employee responses to the schedule change. That plaintiff was replaced by someone eighteen (18) years younger than plaintiff, defendant argues, is not sufficient to meet his burden of proof. Defendant maintains that plaintiff was discharged for misconduct, not for poor work performance. Defendant argues that plaintiff has produced no objective facts that the reason of insubordination is a pretext for age discrimination. Defendant also argues that plaintiff has produced no evidence to support the contention that defendant engaged in a trend of eliminating older employees. Moreover, defendant argues that plaintiff cannot offer evidence that the company discriminated against other persons to prove his claim of discrimination. Finally, defendant argues that alleged age-based remarks by Bell were stray remarks that were remote in time and were unrelated to the decision to discharge plaintiff.

Plaintiff denies that he refused to answer questions from Bell or that he was insubordinate in any manner. Plaintiff argues that the proffered reason by defendant for terminating plaintiff from employment is merely a pretext. Plaintiff argues that it is incredible that a company would fire an outstanding employee of thirty-four (34) years over a perception that he was not forthcoming with information. Plaintiff contends that the circumstances surrounding the two meetings are suspicious and were a "setup" to give Bell a reason to fire plaintiff. Plaintiff argues that the age-based remarks made by Bell were more than stray remarks. Plaintiff has presented statistics produced by a Professor Burke Grandjean which he

claims show that defendant was engaged in age discrimination in terminating from employment older managerial employees.

In response, defendant argues that plaintiff has not presented evidence upon which a jury could reasonably infer that the nondiscriminatory reason assigned by defendant for discharging plaintiff was a pretext for age discrimination. Defendant argues that the court should be skeptical about the use of statistics in this case, because statistics cannot prove the motive behind individual personnel decisions. Defendant argues that plaintiff's expert did not analyze termination data. Defendant argues that the analysis by plaintiff's expert did not consider the reasons for involuntary terminations. Furthermore, defendant argues that Bell himself terminated only two employees: one for stealing (age 42) and plaintiff.

The ERISA Claims

Defendant argues that plaintiff was not eligible for severance pay under the plan because termination for misconduct is not a circumstance under which an employee may claim severance benefits. Defendant also argues that the court must give deference to the factual determinations of the plan administrator, who in this case determined that plaintiff was ineligible for benefits, and that a *de novo* standard of review should not be applied.

Additionally, defendant argues that plaintiff was not prejudiced by the failure of defendant to timely provide the requested information to plaintiff, because plaintiff did not renew his request for information at any time before the oversight was discovered and the appeal

period was reopened. Defendant argues that the appeal was considered on the merits and denied, and that plaintiff suffered no harm from the delay.

Finally, defendant argues that the claim by plaintiff under ERISA § 510, 29 U.S.C. § 1140, that defendant terminated him for the purpose of interfering with the attainment of his right under the severance plan should be dismissed. Defendant argues that plaintiff cannot establish that defendant had the specific intent to violate ERISA. Defendant argues that severance pay is only paid on termination and it is difficult to imagine how an employee could be terminated for the purpose of avoiding severance pay.

Plaintiff argues that he is entitled to severance pay under the severance plan under the phrase "unable to effectively and efficiently perform a job." Plaintiff also argues that the decision of the plan administrator should be disregarded as arbitrary and capricious. Plaintiff argues that Boger never spoke with plaintiff about what transpired at the subject meeting before making her decision.

Plaintiff also argues that the plan only excludes resignation from the recovery of severance pay, and that defendant attempted to couch the reason for terminating plaintiff so as to deny severance pay to plaintiff. Plaintiff argues that he was then prevented from attaining a right to which he was entitled under the ERISA-governed plan.

Law and Discussion

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions

on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[2] The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case.[3] After a proper motion for summary judgment is made, the non-movant must set forth specific facts showing that there is a genuine issue for trial. The non-movant must produce more than a mere scintilla of evidence in its favor, and may not rest upon mere allegation or denials of its pleading.[4] The court must resolve all factual inferences in favor of plaintiff.[5]

The Age Discrimination Claim

The framework established for a Title VII case is applicable to ADEA cases.[6] The framework involves a burden-shifting analysis: (1) plaintiff must demonstrate a prima facie case of discrimination; (2) the burden of production shifts to the employer to articulate a legitimate and nondiscriminatory basis for the adverse employment

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[2] Fed. R. Civ. Pro. 56(c)

[3] **Celotex Corp. v. Catrett,** 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986).

[4] **Anderson v. Liberty Lobby, Inc.,** 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

[5] **Abbott v. Equity Group, Inc.** 2 F.3d 613 (5th Cir. 1993).

[6] "**See McDonnell Douglas Corp. v. Green,** 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); **Bodenheimer v. PPG Indus., Inc.,** 5 F.3d 955, 957 n. 4 (5th Cir. 1993).

decision; and (3) plaintiff must then prove by a preponderance of the evidence that the employer's proffered reason is pretext.[7]

Under the ADEA, there are four elements to a prima facie case of employment discrimination. Plaintiff must prove that: 1) he was discharged: 2) he was qualified for his position; 3) he was within the protected class; and 4) he was replaced by someone outside the protected class, someone younger, or was otherwise discharged because of his age.[8] Plaintiff has met his prima facie burden.

Defendant has articulated a nondiscriminatory reason for terminating plaintiff from employment. Defendant maintains that plaintiff was fired for insubordination.

Plaintiff may prove pretext in two ways: either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employers proffered explanation is unworthy of credence.[9]

Viewed in the light most favorable to plaintiff, the evidence submitted by plaintiff, which plaintiff claims

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[7] **McDonnell Douglas,** 411 U.S. at 802-04, 93 S.Ct. at 1824-25; **Portis v. First Nat'l Bank of New Albany, Miss.,** 34 F.3d 325, 328 n. 7 (5th Cir. 1994).

[8] **"Brown v. CSC Logic, Inc.,** 82 F.3d 651, 654 (5th Cir. 1996), *citing* **Bodenheimer,** 5 F.3d at 957, *and* **Elliot v. Group Medical & Surgical Serv.,** 714 F.2d 556, 563 (5th Cir. 1983).

[9] **Thornbrough v. Columbus and Greenville R. Co.,** 760 F.2d 633, 639 (5th Cir. 1985), *citing* **Texas Department of Community Affairs v. Burdine,** 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

creates a genuine issue of material fact, can be summarized as follows:

Regarding the shift change meetings, in his affidavit, plaintiff attests that "Mr. Bell's statement that [plaintiff] was insubordinate and that [plaintiff] refused to carry out a company order is false." Plaintiff attests that, at the first meeting, "the only reason [he] brought up [his] concerns about the proposed shift work was because [he] thought it was [his] responsibility to Ormet to inform the general manager of the problems that [he] saw with his proposal." Since Bell initiated the discussion on the merit of the shift change, plaintiff did express his " . . . reservations and what [he] saw as the potential problems that might occur." At the second meeting, plaintiff " . . . tried to tell Mr. Bell what the instrument repairmen had said about their dissatisfaction with coming on shift. Mr Bell seemed to attack [plaintiff] as if [he] were complaining about their being put on a shift."

Plaintiff also attests that he " . . . repeatedly explained to Mr. Bell that [he] fully agreed that it was management's prerogative to place the men on shift and that it was not unfair to do so."

Charles Seguin testified in deposition that, at the second meeting, " . . . [plaintiff] was still expressing his views about his reservations about putting people on the shift at this time . . . and [Bell] didn't want to hear the arguments against putting them on shift . . . That had already been covered." Seguin testified that plaintiff was " . . . trying to put it off putting them on shift, trying to get his point across, and by not putting them on shift when [Bell] wanted them on shift." and that this " . . .

created a problem." Seguin testified that plaintiff " . . . was still arguing about putting them on shift, . . . [Bell] wanted to go ahead and move forward, and [Bell] asked [plaintiff] to leave." However, Seguin testified that he never heard plaintiff say anything disrespectful to Bell, and that he is not aware of plaintiff refusing to provide information to Bell when requested in the two meetings.

Guy Amone testified in deposition that, although he did not remember attending an instrument repair meeting, he never saw plaintiff act disrespectfully to Bell.

Regarding the allegation that Bell was biased against plaintiff, plaintiff " . . . believe[s] that Mr. Bell used these meetings as a 'setup' to fire [plaintiff]." Plaintiff " . . . believe[s] that [Bell] was trying to bait [plaintiff] into stating [plaintiff's] concerns about going on shift as an excuse or pretext for firing [plaintiff] for alleged conduct." Plaintiff attests that "Mr. Bell could not have actually thought that [plaintiff] was insubordinate," and that he " . . . believe[s] that [he] was fired because of [his] age."

In the affidavit of Leycester Porter Buratt, Buratt attests that, in the course of explaining cost and profit goals to Buratt, " . . . Bell made the statement that he preferred younger workers because they had more modern ideas and because he could employ younger workers more inexpensively than older ones and thus could have more younger workers at the same cost that he would have to pay for a lesser number of older workers." In

deposition, Buratt testified that he remembered Bell saying that he thought that plaintiff was " . . . getting paid way more than he [was] doing, and [that Bell] could put two or three people to work for that price." Buratt also testified that Bell said that older people " . . . were too set in [their] ways and stuff of that nature, that that's why the plant couldn't progress and couldn't make better production and do this and that and the other." At this, Buratt testified that he ' . . . realized [that] older people's jobs may be in jeopardy." Buratt " . . . assumed [Bell] meant that [older people] had old ideas about how the plant should run."

Plaintiff first submits that a factual dispute exists as to whether insubordination is a pretext for discrimination in this case. Plaintiff denies that he refused to answer Bell or that he was insubordinate in any manner. In support of this contention, plaintiff refers to the deposition of Charles Seguin who was present at the meeting on April 26, 1996, wherein Seguin testified that he never witnessed disrespect from Barfield to Bell. However, Seguin also testified that a disagreement took place:

> Q. Now, did you witness any insubordination by Tom Barfield?
>
> A. Well, the last meeting we were in, there was a disagreement. [Bell] was still adamant about the shift, and [Barfield] was still giving his opinion against it. I don't know the exact words that transpired, but [Bell] asked [Barfield] to leave,

It is clear that Bell became angry with Barfield at the April 26, 1996 meeting. Bell may have misinterpreted the

responses given by Barfield, but this does not amount to a pretext for discrimination.

Plaintiff further contends that Bell was biased against plaintiff and wanted to discharge plaintiff. Plaintiff relies on the deposition and affidavit testimony of Porter Buratt as direct evidence of discrimination intent. Buratt testified that, in conversations between Buratt and Bell in December of 1994 (at the latest), Bell commented that Barfield was " . . . getting paid way more than [he was] doing, and [Bell] could put two or three people to work for that price." Buratt also testified that Bell indicated that the plant could not progress because " . . . [the older workers] were too set in [their] ways . . . "

However, Buratt also testified that this testimony regarding the comments made by Bell was "[n]ot those exact words but very similar." When Bell indicated to Buratt that a potential candidate for a position would not be productive because he was from the same old school as Buratt and others, Buratt testified that he " . . . assumed [Bell] meant that [Buratt and others] had old ideas about how the plant should run . . . "

Defendant maintains that these alleged comments are "stray remarks." In order for an age-based comment to be probative of an employer's discriminatory intent, it must be direct and unambiguous, allowing a reasonable jury to conclude without any inferences or presumptions that age was an impermissible factor in the decision to terminate the employee."[10] Courts have recognized that

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[10] **EEOC v. Texas Instruments, Inc.**, 100 F.3d 1173 (5th Cir. 1996), *citing* **Bodenheimer v. PPG Industries, Inc.**, 5 F.3d 955, 958 (5th Cir. 1993).

statements about the need to make room for younger management reflects a kind of truism that does not evidence discrimination.[11] The statements allegedly made by Bell in late 1994 to Buratt are merely an expression by Bell of his commitment as general manager to progress and efficiency. That Buratt resigned because he thought that his job may be in jeopardy is irrelevant. A personal belief is no substitute for evidence. The statements are stray remarks that do not demonstrate age bias.

Finally, plaintiff contends that statistical evidence shows that defendant was engaged in age discrimination in "weeding out older management employees." Plaintiff submits the affidavit of Professor Burke Grandjean, a professor of statistics and sociology who has studied and written on employment patterns.

Defendant maintains that the statistical evidence falls short of proving pretext, because Dr. Grandjean failed to take into account possible causes for involuntary termination, but merely considered the age of those terminated. Defendant submits by affidavit the stated reason for each discharge during Bell's tenure as general manager. Defendant also maintains that Bell personally made the decision regarding only two of the seventeen individuals fired during the longest period covered by the Grandjean analysis.

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[11] **Texas instruments, Inc.**, 100 F.3d at 1181-1182, *citing* **Birkbeck v. Marvel Lighting Corp.**, 30 F.3d 507, 512 (4th Cir. 1994), *cert. denied* 513 U.S. 1058, 115 S.Ct. 666, 130 L.Ed.2d. 600 (1994) (statement that "there comes a time when we have to make room for younger people" creates no inference of age discrimination).

While statistical data may be used to establish a prima facie case, statistical evidence cannot be used to establish pretext when it is the only evidence a plaintiff has to offer on that issue.[12] Moreover, the generalized statistical evidence submitted by plaintiff in this case fails to rebut the particularized, nondiscriminatory rationale behind plaintiff's discharge in this case. In **Daubert v. Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the Supreme Court urged the district courts to act as "gatekeepers" of proffered expert opinion testimony. The opinion of Professor Grandjean would not be permitted to go to the jury upon the trial of this case in this court because it is not based upon acceptable scientific analysis. See **Darrell Huff, How to Lie with Statistics**, W.W. Norton & Co. (Paperback reissue 1993).

Plaintiff has failed to establish that insubordination was a pretext used by defendant for age discrimination. Plaintiff has failed to produce sufficient evidence of age discrimination creating a genuine issue of fact for trial.

The ERISA Claims

Debra Boger, administrator of the company severance plan, determined that plaintiff was terminated for insubordination and therefore was not "terminated in the interest of company convenience." A denial of benefits challenged under § 502(a)(1)(B) of ERISA. 29 U.S.C. § 1132(a)(1)(B), is reviewed under a de novo standard unless the plan gives the administrator "discretionary

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[12] **Deloach v. Delchamps, Inc.**, 897 F.2d 815 (5th Cir. 1990).

authority to determine eligibility for benefits or to construe the terms of the plan."[13] If the administrator has discretionary authority, a reviewing court applies an abuse of discretion standard.[14] Discretionary authority cannot be implied; an administrator has no discretion to determine eligibility or interpret the plan unless the plan language expressly confers such authority on the administrator.[15] The severance plan in this case specifically reserves to the corporation the right to interpret and apply the plan. Therefore, an abuse of discretion standard of review is applied.

The stated policy in the plan is for " . . . the Corporation to grant severance allowances to eligible salaried employees in the event of their being Terminated in the Interest of Company Convenience . . . " The policy " . . . does not apply to temporary lack of work or termination of employment due to retirement, death, or disability."

The plan defines "terminated in the interest of company convenience" as "being terminated by the Corporation in a work force reduction or job elimination where other suitable assignments are not available and rehire is considered unlikely, or where, in the judgment of the Corporation, a person is unable to effectively and efficiently perform a job." Plaintiff admits that he was not

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[13] **Firestone Tire & Rubber Co. v. Bruch,** 489 U.S. 101, 115, 109 S.Ct. 948, 956, 103 L.Ed.2d 80 (1989).

[14] **Id.**

[15] **Cathey v. Dow Chemical Co. Medical Care Program,** 907 F.2d 554, 558 (5th Cir. 1990), *cert. denied,* 498 U.S. 1087, 111 S.Ct. 964, 112 L.Ed.2d 1051 (1991).

terminated as a result of a work force reduction or job elimination. Although inconsistent with his position that he was terminated as an act of age discrimination, plaintiff argues that he was terminated in the interest of company convenience. Plaintiff submits that an allegedly "insubordinate" employee is clearly "unable to effectively and efficiently perform a job." Further, plaintiff submits that, whereas earlier versions of the company severance plan did in fact include "insubordination" as a reason for denial of benefits, the current plan makes no such specific reference.

Defendant maintains that the plan policy is a competency standard, and that plaintiff was quite competent to perform the work.

The company plan clearly specifies those situations to which it does not apply: "temporary lack of work or termination of employment due to retirement, death, or disability." Clearly, insubordination is not retirement, death, or disability. Additionally, severance pay should not be provided to employees who are only temporarily not reporting to work because of a decline in business. The court finds that the policy does not exclude termination for insubordination, misconduct, disobedience, or any other wrongdoing. The court finds no abuse of discretion on the part of the plan administrator. Plaintiff is entitled to severance pay under the company policy.

Regarding the claim by plaintiff for penalties pursuant to 29 U.S.C. § 1132(c),[16] defendant concedes that plaintiff was not timely provided with the requested information for his appeal of the denial of severance pay. However, defendant argues that the delay was not caused by the administrator, and that no harm was caused by the delay, because the appeal period was reopened.

The court finds that, although plaintiff was not timely provided with requested information, such delay was not at the hand of the administrator. Additionally. plaintiff was able to appeal as if he had timely received the information.

Regarding the claim by plaintiff under 29 U.S.C. § 1140, plaintiff argues that defendant attempted to couch the reason for discharging plaintiff in such a manner as to deny him severance pay. Defendant maintains that plaintiff has not proven that defendant had the specific intent to interfere with plaintiff's entitlement to benefits under the ERISA plan. Section 510 of ERISA provides in part:

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[16] 29 U.S.C. § 1132(c) provides, in pertinent part:

Any administrator . . . who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion. order such other relief as it deems proper.

> It shall be unlawful for any person to discharge . . . a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the Plan . . . [17]

To recover under section 510, a plaintiff need not show that the sole reason for his termination was to interfere with pension rights; however, the plaintiff must show that the employer had the specific intent to violate ERISA.[18] The proffered evidence in this case will not support the conclusion that plaintiff was fired because of his eligibility for benefits under the ERISA plan any more than the conclusion that he was terminated due to his age.

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[17] 29 U.S.C. § 1140.

[18] **Hypes On Behalf of Hypes v. First Commerce Corp.**, 134 F.3d 721 (5thh Cir. 1998), *citing* **Olitsky v. Spencer Gifts, Inc.**, 964 F.2d 1471, 1478 (5th Cir. 1992) (*citing* **Clark v. Resistoflex Co., Div. of Unidynamics Corp.**, 854 F.2d 762, 770 (5th Cir. 1988)) *and* **Hines v. Massachusetts Mut. Life Ins. Co.**, 43 F.3d 207, 209 (5th Cir. 1995) ("[a]n essential element of a Section 510 claim is proof of defendant's specific discriminatory intent").

Conclusion

Accordingly, for the reasons assigned, the motion by defendant for summary judgment (Doc. 24) is hereby GRANTED.

Baton Rouge, Louisiana, July 28, 1998.

/s/ John V. Parker
JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

THOMAS A. BARFIELD	CIVIL ACTION
VERSUS	NO. 97-246-A
ORMET PRIMARY ALUMINUM CORPORATION	

RULING ON MOTION FOR NEW TRIAL OR, ALTERNATIVELY, TO AMEND JUDGMENT

(Filed Aug. 19, 1998)

This matter is before the court on a motion by plaintiff, Thomas Barfield, for new trial or, alternatively, to amend judgment (Doc. 39). Defendant, Ormet Primary Aluminum Corporation ("Ormet"), opposes the motion. Federal question jurisdiction is based on the Employee retirement Income Security Act ("ERISA"), 29 U.S.C. §1001 *et seq.*, the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*, and supplemental jurisdiction, 28 U.S.C. §1367. There is no need for oral argument.

On July 28, 1998, the court granted the motion by defendant for summary judgment, and on July 30, 1998, the court entered judgment in favor of defendant. However, the last sentence of the first full paragraph of page 15 of the ruling on the motion for summary judgment contained the following typographical error: "Plaintiff is entitled to severance pay under the company policy."

Accordingly, the motion by plaintiff for new trial or, alternatively, to amend judgment (Doc. 39) is hereby GRANTED. The court hereby corrects the statement contained on page 15 of the ruling issued July 28, 1998 (Doc.

37) to read: "Plaintiff is *not* entitled to severance pay under the company policy."

Baton Rouge, Louisiana, August 19, 1998.

/s/ John V. Parker
JOHN V. PARKER, CHIEF
JUDGE
MIDDLE DISTRICT OF
LOUISIANA

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30934

THOMAS A BARFIELD

Plaintiff – Appellant

v.

ORMET PRIMARY ALUMINUM CORPORATION

Defendant – Appellee

Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge

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ON PETITION FOR REHEARING EN BANC

(Opinion 6/30/99, 5 Cir., ___, ___, F.3d ___)

(Filed Aug. 18, 1999)

Before DAVIS, DUHÉ and PARKER, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor Judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel

Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ John M. Duhé Jr.
United States Circuit Judge